No. 85-1259

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

EDWARD LUNN TULL,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE WASHINGTON STATE TRIAL LAWYERS ASSOCIATION

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I

INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association (hereafter "WSTLA") is a voluntary non-profit membership organization dedicated to the advancement of the legal profession and protection of the legal rights of citizens of the State of Washington. The organization and its membership have a significant interest in preservation of the constitutional right to trial by jury in civil actions. The decision of the Court in this case will likely resolve present uncertainties with regard to entitlement to a jury trial in civil penalty cases prosecuted by the government. It will necessarily have a substantial impact on clients represented by WSTLA's membership. Both Petitioner Tull and Respondent United States have

consented to WSTLA's appearance as amicus curiae and proof thereof will appear in the Clerk's file.

II

QUESTION PRESENTED

Whether the Seventh Amendment to the United States Constitution entitles a citizen to a trial by jury in a civil action commenced by the government in federal district court seeking civil penalties under federal law?

III

SUMMARY OF ARGUMENT

Under English common law prior to 1791 a civil jury trial was available for actions involving governmental claims for penalties and forfeitures. Further, events surrounding the Revolution,

adoption of the Constitution, and enactment of the Seventh Amendment should be considered as relevant by the Court in resolving the question presented. Such events unmistakably demonstrate the Seventh Amendment was designed to protect the citizenry in cases exactly like this one.

IV

ARGUMENT OF AMICUS CURIAE WSTLA

The right to a jury in a civil or criminal context has been a basic concern of the people throughout the history of this country. The deprivation of jury trials by the Crown was specifically mentioned as a grievance in the Declaration of Independence. Thomas Jefferson wrote of the right to trial by jury that,

> I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.

3 Writings of Thomas Jefferson (Washington ed.) 71. The absence of a specific guarantee to right of trial by jury in civil cases threatened ratification of the United States Constitution. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 638, 657, 669 (1973) [hereafter "Wolfram"]. One of the first acts of Congress after ratification of the Constitution was promulgation of the Seventh Amendment as part of the Bill of Rights. Wolfram, at 672-673.

Since its enactment, this Court has continuously recognized the profound importance of the right to jury trial protected by this Amendment.

> The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.

Jacob v. New York, 315 U.S. 752, at 752-53 (1941).

As a statement of fundamental principles, the Seventh Amendment simply provides "[i]n Suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved . . . ". Questions regarding interpretation and application of the Seventh Amendment have been resolved by evaluating the phrase, "[s]uits at common law," by reference to the common law of England as it existed prior to 1791. Curtis v. Loether, 415 U.S. 189,

193 (1974). However, this Court has not limited this right to jury trial solely to common law actions recognized at that time, but taken into account other relevant factors such as subsequent developments in expansion of remedies and modifications in civil procedure. Curtis at 266; Ross v. Bernhardt, 396 U.S. 531, 538 (1970) (applicability depends on "nature of issue tried rather than the character of the overall action"); Wolfram at 738. The primary focus, however, remains on whether historically the type of action involved, or its antecedent, was cognizable in the ordinary courts of law, as opposed to the equity and admiralty courts. Atlas Roofing Co. v. Occupational Safety Commission, 430 U.S. 442,

449 (1977); Parsons v. Bedford, 3 Pet. 433, 7 L.Ed. 732 (1830).[1]

Applying the historical approach to the circumstances involved here requires upholding the right to a jury trial in cases by the government seeking civil penalties. The right to jury trial in penalty cases in England existed during Colonial days.[2] To the extent that the Colonies did not similarly share the right to jury trial in penalty cases,

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[1]The common law as applied by the individual Colonies has not been used as a source for determining the common law as of 1791 due to variances in jury trial practices. Wolfram at 711.

[2]Petitioner's brief on the merits, a draft of which was reviewed by Amicus Curiae WSTLA, surveys English and American common law demonstrating the historical treatment of suits for enforcement of civil penalties as common law actions. These authorities are not repeated here. However, as noted in the main text, in the Colonies England made repeated efforts to wrest from the Colonists the right to trial by jury. See, Goebel, post, p. 6.

this was in some instances due to heavy-handed legislating by the Crown designed to specifically deny the Colonists this right.[3] In his work tracing the development of the Constitution and courts through 1801, Professor Julius Goebel, Jr., relates that in the mid-18th century the Colonists were subjected to trade legislation designed to foreclose access to civil jury trials involving penalties and forfeitures. See, J. Goebel, Jr., I History of the Supreme Court of the United States: Antecedents and Beginnings to 1801, pp. 83-95 (Macmillan, 1971)

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[3]There was generally a strong tradition of civil jury trial in the Colonies prior to the Constitutional Convention. Wolfram at 656. This tradition is traceable to the common law of England, witnessed by Blackstone's characterization of civil jury trial as "the glory of English law." Id. at 654, fn. 45.

[hereafter "Goebel"].[4] As related by Professor Goebel, during this period English law provided for enforcement of trade laws in the realm in its common law courts while, as to enforcement in the Colonies, permitting the informer to elect between the common law courts and vice-admiralty courts. Goebel at 86-87.[5] Professor Goebel recounts these events as representing a significant shift in the Colonial constitutional approach by England:

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[4]This volume is one of eleven relating the history of the Supreme Court of the United States funded by a bequest by Oliver Wendell Holmes, Jr., which resulted in an act of Congress establishing the Oliver Wendell Holmes Devise Fund.

[5]In the early common law an "informer" was anyone who was enfranchised by statute to pursue recovery of penalties on behalf of the government. Some statutes permitted the informer to retain a portion of the penalty recovered. See generally, Marvin v. Trout, 199 U.S. 212, 225-26 (1905).

> If one can speak of a Colonial constitutional approach in the first half of the 18th century general to all Colonies and divorced from the acerbities produced by single crises, it was the philosophy of the modus vivendi--nurtured by the long period of 'salutory neglect' begun under Sir Robert W. Walpole. This philosophy had been imperilled by measures taken during the French and Indian War. It was shattered after 1763 by changes in English fiscal policy, and the concurrent alteration of the methods of enforcing trade laws.
>
> The initial gambit in the new English policy was a statute (1763) seeking to tighten enforcement by extending to the plantations an earlier hovering act, and authorizing use of the Royal Navy to prevent smuggling, thus diverting these ships, as a New York merchant complained, into 'floating Custom Houses.' In the Colonies, penalties and forfeitures were committed at the option of the informer to courts of admiralty or to courts of record; in the realm common law courts. This was the first of a series of statutes that was to raise the question of deprivation of jury.

Goebel at 85 (footnotes omitted).

These events provide insight as to why the Colonists had such concern about the right to jury trial and why, later, the Antifederalists would be so insistent upon assurances in our Constitution preserving this right. Goebel at 319; Wolfram at 672. In commenting upon the effect these maneuverings, viz. England's channeling of revenue penalty and forfeiture cases into Colonial vice-admiralty courts, had on Colonial attitudes toward the right to trial by jury, Professor Goebel concludes:

> The Americans could not but regard this act as an assault upon the right to jury trial. Their attachment to this form of trial was then neither irrational nor a species of romantic illusion. In the harsh criminal procedure of the day it was only the jury that could dispense the leaven of mercy, and in civil proceedings it functioned as an immediate corrective for the lack-learned or overbearing judge. Insofar as the Colonists

> had in their several jurisdictions settled their own constitutional standards, jury trial and by men of the vicinage was high among these, a palladium against officialdom. To subtract this protection, to the end that collection would be assured of revenues imposed without consent, amounted in Colonial eyes to the employment of an unconstitutional means to effect an unconstitutional end.

Goebel at pp. 86-87.

The strong Colonial bent toward protection of the right to trial by jury, both criminal and civil, was carried forward by the Antifederalists. Goebel at 319. Indeed, Wolfram notes that only with regard to the issue of civil jury trials did the Antifederalists prevail. Wolfram at 672. The Constitutional Convention had been absorbed with the structure of the new government and formulating a "document of first principles." While there was some discussion

of a Bill of Rights toward the end of the Convention, including entitlement to civil jury trial, it was thought better to leave the matter to the new Congress. Id. at 666. The omission of civil jury trial from the Constitution became a dominant objection by Antifederalists such as George Mason of Virginia. The issue was of such moment that Alexander Hamilton devoted an entire Federalist paper to examination of trial by jury in civil cases. The Federalist No. 83 (J. Cooke ed. 1961). Professor Wolfram notes:

> The fact remains that the ratification process brought to light strongly felt popular beliefs about government and its relationship to the person in the street and the importance of the civil jury in preserving that relationship.

Id. at 669.

* * *

> In the end, the defenders of the proposed Constitution were reduced almost entirely to defending the omission of a guarantee of jury trial as a problem of technical draftsmanship. The Federalists repeatedly promised that this would be disposed of by appropriate legislation as one of the first items of business of the new Congress. This assurance was asserted amidst a chorus of Federalist disclaimers of any intent to limit jury trial in civil cases in the proposed federal courts.

Id. at 666 (fn. omitted). Because of the role the Antifederalists played in the enactment of the Seventh Amendment their views should be "acutely relevant to a determination of the intended reach of the amendment." Wolfram at 669, fn. omitted.[6] Professor Wolfram synopsizes

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[6]The suggestion that the views of the Antifederalists, and the reaction to them culminating in the Bill of Rights and the Seventh Amendment, is worthy of special note mirrors Justice Rehnquist's observations in his dissent in Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979), where he noted " . . . the decision of this case

the underlying reasons for Antifederalist insistence on civil jury trials as follows:

> Surviving materials demonstrate that the antifederalists advanced several distinct and specific arguments in favor of jury trial: the protection of debtor defendants; the frustration of unwise legislation; the overturning of the practices of courts of vice-admiralty; the vindication of the interests of private citizens in litigation with the government; and the protection of litigants against overbearing and protective judges.

Id. at 670-71.

The abhored suits at vice-admiralty for forfeitures and penalties which motivated the Antifederalists to insist on a bill of rights to guarantee the

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turns on the scope and effect of the Seventh Amendment, which, perhaps more than any other provision of the Constitution, are determined by reference to the historical setting in which the Amendment was adopted." 439 U.S. at 339-340 (Rehnquist, J., dissenting).

right to trial by jury is the practical historical equivalent of the present day suit for civil penalties brought against Tull. Amicus submits the proponents of the Seventh Amendment would be dumbfounded to see the hated non-jury vice-admiralty procedure rear its head again despite the enactment of the Seventh Amendment to put it to rest.

The concern of the Colonists and Antifederalists, and the first Congress which assuaged anxieties in the new nation by enacting the Seventh Amendment, cannot be overlooked in this suit by the government against a citizen. Wolfram at 673. This type of litigation was one of the very reasons for the Seventh Amendment. This Court should recognize the significance of the historical events in the Colonies giving rise to the Seventh

Amendment and uphold the right of a citizen to a trial by jury in civil penalty cases prosecuted by the government.

V

CONCLUSION

Amicus curiae WSTLA respectfully submits this Court should uphold petitioner Tull's right to jury trial, as guaranteed by the Seventh Amendment to the United States Constitution.

Respectfully submitted this 15 day of August, 1986.

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